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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 289

GLENN DOHERTY, LOUIS BERTUCCI, MORRIS ABRAMS, WILLIAM McCABE AND JOHN ZOBOIWCHAK, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in this cause on June 16, 1964. The judgments affirmed their convictions for violating the criminal provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 530, in interfering with the rights granted members under the Act.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, on a motion to dismiss the indictment, is reported at 50 L.R.R.M. 2974 (A. App. 21a-23a).[1] The opinion of the Court of Appeals has not yet been reported. It is set forth as Appendix A to this petition.

JURISDICTION

The judgments of the Court of Appeals were entered on June 16, 1964 (App. 17a-21a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES AND RULE INVOLVED

Sections 101 (a) (1) and 101 (a) (2) of the Labor-Management Reporting and Disclosure Act of 1959, U.S.C. 411 (a) (1) and 411 (a) (2), provide:

> "Sec 101(a)(1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an ele-

[1] The Appendix filed by the Petitioners in the Court of Appeals is cited herein as A. App. The Appendix to this Petition is cited as App.

tion of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Section 610 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 530 provides:

"Sec. 610. It shall be unlawful for any person through the use of force or violence or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Rule 6 (e), Federal Rules of Criminal Procedure, provides:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a show-

ing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

QUESTIONS PRESENTED

(1) Whether a federal judge is required, upon proper request by defense counsel, to read the grand jury testimony of government witnesses *in camera* and to make such testimony available to the defense for purposes of cross-examination should inconsistencies be found between the grand jury testimony and the testimony at trial.

(2) Whether a defendant, indicted for a violation of 29 U.S.C. 530, is entitled to an instruction that the force, violence or threat thereof, which such defendant is charged with exercising against a member of a labor organization, must be for the specific purpose and with the specific intent of interfering with or preventing the exercise of a right to which such member is entitled under the Labor-Management Reporting and Disclosure Act.

STATEMENT

A seventeen-count indictment was returned against the petitioners and one other in the United States District Court for the Eastern District of Pennsylvania on April 11, 1962 (A. App. 1a-20a). They were charged with having infringed upon the rights guar-

anteed certain named individuals by Sections 101 (a) (1), 101 (a) (2), and 101 (a) (5) of the Labor-Management and Reporting and Disclosure Act of 1959, 29 U.S.C. 411 (a) (1), (1) and (5), all in violation of Section 610 of the Act, 29 U.S.C. 530, and with conspiring to do so in violation of 18 U.S.C. 371. The charges against one named defendant were dismissed on motion of the United States (A. App. 26a, 27a) as was the charged violation of Section 101 (a) (5). Following trial the petitioners were convicted on ten of seventeen counts (A. App. 569a-570a) and were sentenced to two one-year prison terms, to run consecutively, and fines and probationary periods in addition thereto (A. App. 581a, 648a-655a).

Background

Transportation Checkers, Receivers and Clerical Workers Local 161 is an unincorporated labor organization in the Philadelphia, Pennsylvania, area affiliated with the International Brotherhood of Teamsters. It represents, among others, the clerical employees of the Philadelphia Transportation Company (PTC), the city's rapid transit operation (A. App. 257a-259a). In 1961, Local 161 had a vocal and well organized minority group which was known as SWEEP. In late 1961, as the time came to consider the negotiation of a new contract with the Company, a membership meeting of Local 161 was adjourned by the presiding officer as a result of disagreement over the right of SWEEP members to present various resolutions relating to the contract (A. App. 433a-445a). The correctness of the presiding officer's ruling and which element within the union caused the meeting to become chaotic were matters of dispute during trial but

are not at issue here. As a result of the adjournment of the meeting, however, no business was effectively conducted.

The minority group then filed suit in the United States District Court for the Eastern District of Pennsylvania. *Axler, et al.* v. *Transportation Checkers, Receivers and Clerical Workers, etc., et al.*, Civil Action 30762 (A. App. 585a-606a). Founded on Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411-415, the suit sought a mandatory injunction requiring the union to hold regular meetings (this had not been the practice) and a specific direction that a meeting be held at which the proposed contract could be considered, discussed and either ratified or rejected. The union consented to an order directing that such a meeting be held on February 22, 1962, and agreed to procedures for a further mail referendum on acceptance of the contract (A. App. 598a-599a).

The February 22, 1962 Meeting and Subsequent Events

The Secretary-Treasurer of Local 161 (the union's principal executive officer), on the day of the proposed meeting, received information that a group of members were "going to cause trouble" at the meeting (A. App. 410a, 435a, 453a). The members involved had signed authorization cards with the Seafarers International Union and sought to substitute SIU as the representative of PTC employees. Charges had been filed against them within the union on grounds of fostering secession and they were later expelled from membership. The events of February 22, 1962, took place between charge and expulsion. At an emer-

gency telephone meeting of the local union executive board, a resolution was passed that nine named members be refused admission to the meeting for the reasons that they were "planning to disrupt and break up the meeting by the use of rowdyism, force, and violence" and that they had "for their object to prevent the members of Local 161 from conducting their regular local union business in an orderly fashion." (A. App. 619a). Prior to the adoption of this resolution, the Local received advice as to its legality from its attorney (A. App. 466a-467a) and the text of the resolution was prepared by another attorney (A. App. 426a-427a).

The list of those persons to be excluded was passed on to the doorkeeper.

When Edmond Flounders was advised that he was not to be admitted (erroneously, for his name was not on the list) a fight ensued. Flounders testified about the fight three times: once in the civil trial, once before the grand jury and, finally, in this case. At the previous civil court hearing, he had testified:

> "Q. And now will you tell Your Honor what you now did. Will you tell His Honor—I beg your pardon—what you now did?
>
> "A. I came to the meeting with the—with Bob Donnelly and Andy Quirk and Bobby Braubitz and myself. They—we all—we all got out of the car together and they, I believe, went over and were talking in a group and I was talking to some other people. In the meantime, I see Bob Donnelly come down and speak to a police officer, a fellow with a crew cut, rather medium build. So I walked away from from them and walked into the union, tried to walk into the union hall, and I

had my union card in my hand and I said, 'Here is my card. I would like to get in the meeting.'

"A. Who did you say that to?

"A. Toots Bertucci. He said, 'Uh-uh.'

"I said, 'What do you mean, Toots, Uh-uh?' I said, 'My union dues are paid. I had received no letter that I had been suspended for any charges against 161 Local.'

"He says, 'Look, God damn it, if you are looking for trouble, you are going to get it.'

"So some fellows come down the stairway after me and kept hollering, 'Toots,' and first thing you know—know—I know, I got a punch in the mouth and started to back away, and about four fellows jumped me, and the last thing I remember I was being picked up out of the gutter out in Spring Garden Street." (A. App. 42a-43a)

Before the grand jury, he had testified:

"A. So he says, 'Uh-uh, you can't come in here.'

"And I says, 'Well, I am a dues-paying member. I pay $6 a month and I haven't been expelled from the union. Why can't I come in?'

"He says, 'Look, God damn it, if you are looking for trouble you are going to get it.'

"So there must have been a stairway coming down this way and there must have been a stairway coming down this way.

"Q. That is to the entrance to the hall?

"A. To where Toots was standing from the upper floors or some place because as soon as he said, 'Look, God damn it, if you are looking for trouble you are going to get it.'

And this fellow clipped me on the side of the face." (A. App. 47a)

At the trial, his testimony was substantially different and, if credited, would have supported the suggestion

that he had started the fight by attempting to force his way into the meeting:

> "Q. And what occurred when you approached that point? A. I took my union card from my pocket and I showed it to Toots and Toots had his back turned towards me and I says, 'I am Flounders, Toots,' and I showed him my union card. I says, 'How about coming in?' He said 'Uh-uh.' I said, 'Well, my union dues are paid. I haven't been expelled. I am a member in good standing. I'd like to come in.' He says, 'Uh-uh.'
>
> Q. Then what happened, sir? A. I don't know whether after I showed Toots this card, I will say Mr. Bertucci because he is a man, I said, 'I don't understand why' and *I don't know whether I was shoved into Toots or whether I took the first punch at Toots* or not but a melee followed." (Emphasis supplied) (A. App. 39a)

While the government was permitted to plead surprise and cross examine Flounders from his prior inconsistent testimony, he refused to be shaken. After being shown such testimony, the following ensued:

> "The only doubt I have in mind would be when I entered the union hall with my union card in my hand and showed it to Toots Bertucci and after I showed it to Toots Bertucci and he said, 'Uh-uh' when I asked him to be admitted and in the events that followed *I am not sure whether I was pushed or whether I took a punch at Toots for not being admitted to the hall.*" (Emphasis supplied) (A. App. 43a)

On cross-examination, he reiterated this testimony:

> "Q. At that point according to your testimony to Mr. DePaul in response to his questions you stated that you might have been pushed in from behind or possibly you took a swing at Bertucci

because you were mad because he wouldn't let you into the hall? A. Yes, sir.

Q. Mr. DePaul tried to read some prior statements to you which he suggested were inconsistent but is it your testimony now, Mr. Flounders, that either you were pushed into Mr. Bertucci while he was standing there or that there is a possibility that you took the first punch at him? A. That's true." (A. App. 69a)

One of the two remaining eye-witnesses who testified, a Mrs. Margaret Walker, stated:

"A. I saw Mr. Braubitz push Mr. Flounders through the doorway.

Q. Yes? A. And as he did Mr.—he grabbed ahold of Mr. Bertucci's shoulders.

Q. Who grabbed—excuse me, who grabbed—— A. Mr. Flounders grabbed Mr. Bertucci's shoulders.

Q. Yes, ma'am. A. And as Mr. Bertucci turned to face him, Mr. Flounders flung his arm out and aimed a punch." (A. App. 416a)

She further testified:

"Q. Is there any question in your mind, Mrs. Walker, that Mr. Flounders threw the first punch? A. No, sir, there is not." (A. App. 416a)

On cross-examination, the Government was not able to shake Mrs. Walker's recollection on this incident. On redirect, she concluded:

"Q. As a result of the questions that Mr. DePaul has asked you about where you were standing is there any doubt in your mind, Miss Walker, as to who threw the first blow that evening? A. No, sir, there is not." (A. App. 421a)

Defendant William McCabe, the only other eyewitness to the incident in question, verified Mrs. Walker's version in its entirety:

> "Q. Yes, sir. I asked you to describe in your own words what if anything happened when you heard this commotion by the door? A. When I heard the commotion I turned around and looked over toward the door. When I looked over I seen a bunch of fellows trying to get in past Mr. Bertucci there and *I seen one fellow, which I later found out was Mr. Flounders, he threw a punch at Mr. Bertucci.*" (Emphasis supplied) (A. App. 495a)

Whatever the origin of the affray (and it becomes significant in view of several of the requested instructions which were refused), Flounders was rather severely beaten in the fight which followed. While this was the first, and only, act of violence, other persons were also excluded from the meeting.

Soon after the meeting was held, the plaintiffs in *Axler, et al.* v. *Transportation Checkers, etc., et al., supra,* returned to the United States District Court for the Eastern District of Pennsylvania, and sought a contempt citation against the officers of Local 161 for violating the consent order to which they had previously agreed by excluding members from the court-ordered meeting. After a lengthy hearing, at which the full details of the scuffle were aired, the trial judge denied the motion in an opinion which contained the following language:

> "It is the judgment of this Court that the Court's order of February 1, 1962, has been complied with, and for that reason the motion of the plaintiffs is denied.

It is not to be understood by this order that the Court condones what was done with regard to those individual members who were barred admittance. The Court passes no judgment whatsoever on whether the individual rights of those persons were violated such as to give them individual causes of action under the Act.

But the Court is satisfied that the actions taken by the defendant union were made in good faith, and after consultation with their counsel, and a judgment made dealing with circumstances as they then appeared to exist." (Emphasis supplied) (A. App. 606a)

The indictment was returned one month later.

The Trial of the Criminal Case

Early in the course of the trial, counsel for the petitioners asked the court to review *in camera* the grand jury testimony of all government witnesses and turn such testimony over to the defense for use on cross-examination if inconsistencies were found with the testimony which was given at trial (A. App. 94a-95a). The government did not object and the trial court took the request under advisement. Upon the court's return to the bench the next day, the following ruling was announced:

"The Court: Let the record show that Mr. Bergan requested the Court to read in camera the testimony of various witnesses who testified before the Grand Jury, and also that if there is any variance between their testimony before the Grand Jury and their testimony before this jury, that he, Mr. Bergan, be permitted to read the testimony and use it for cross-examination. Is that right?

* * * * * * * * *

> The Court: Yes, and the Court has studied the matter and concluded that it would not be proper to give Mr. Bergan the testimony of the various witnesses who will testify before this jury that testified before the Grand Jury, but has ruled in all cases where Mr. DePaul pleads surprise as to the testimony of any witness who testified before the Grand Jury, that that witness's testimony will be made available completely to Mr. Bergan. Otherwise, the testimony before the Grand Jury shall remain secret." (A. App. 255a-256a)

His denial was further explained in his ruling on the motion for a new trial:

> ". . . as I told counsel I didn't feel that I should assume the responsibility of reading all through the testimony before the Grand Jury and telling whether or not it complied, . . . *the responsibility to say that it varied . . . would be a responsibility to which the Court didn't want to assume.*" (Emphasis supplied) (A. App. 574a)

Prior to the conclusion of the case, the court asked for and received a series of instructions from both the government and the defense as to the theory under which the case should be submitted to the jury. The defense submitted a series of instructions which sought to inform the jury of the specific intent required to violate the statute and the meaning of the concept of willfullness (A. App. 644a-647a). The instructions were patterned after those which had previously been approved by this Court and by the Courts of Appeals under the Federal Civil Rights Act, 62 Stat. 696, as amended, 18 U.S.C. 242. The instructions sought to inform the jury, *inter alia*, that force offered in response to an attack, or in aid of the de-

fense of another, or during a spontaneous outbreak did not violate the Act. The specific instructions involved, all of which were denied by the Court, are annexed hereto as Appendix B.

REASONS FOR GRANTING THE WRIT

In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 401 (1959), this Court, in holding that the defense did not have an absolute right to the grand jury testimony of government witnesses, concluded with the following paragraph:

> "Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge. . . . *Resolution of that question must await a case where the issue is presented by the record.* The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have." (Emphasis supplied)

Petitioners ask this Court now to decide the question then specifically left for later determination.

Since 1959, there has arisen a direct and irreconcilable conflict in the circuits as to the correct procedure to be followed. The United States Court of Appeals for the Second Circuit in *United States* v. *Giampa*, 290 F.2d 83, 85 (2nd Cir. 1961), has made it clear that the defense has the right to such an *in camera* examination. In laying down a rule to be followed by District Courts within the Second Circuit, the court stated:

> "To avoid uncertainty in the future upon trials wherein this problem arises, certain fundamental principles should be observed. If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel."

On the other hand, the United States Court of Appeals for the District of Columbia Circuit in *Gordan* v. *United States*, 299 F.2d 117, 118-19 (D.C. Cir. 1962), although ordering such inspection, specifically refused to follow the broad holding of Giampa:

> "To be distinguished from our ruling are those decisions elsewhere which indicate the availability of *in camera* inspection by the trial judge regardless of the number of prosecution witnesses at trial who may also have testified before the grand jury. [citing *Giampa*]. We do not agree with the broad sweep of these holdings and we decline to adopt a rule which goes so far."

The United States Court of Appeals for the Eight Circuit, in *Hance* v. *United States*, 299 F.2d 389, 398 (8th Cir. 1962), has also declined to follow *Giampa*, as has the Tenth Circuit in *Bary* v. *United States*, 292 F.2d 53 (10th Cir. 1961). The Third Circuit has now cast its lot with those circuits specifically disapproving *Giampa*. In the case at bar, the Court of Appeals made the following comment:

> "Appellants cite *United States* v. *Giampa*, 290 F.2d 83, 85 (2nd Cir. 1961) as the legal basis for

their request. With all respect, we think that decision misconceives the problem and fails in its attempted resolution thereof." (App. 8a-9a)

Also see *United States* v. *Boyance*, —F.2d—(3rd Cir., Mar. 26, 1964), certiorari denied, *sub nom, Feldman* v. *United States*, —U.S.—(1964).

Classically, the following reasons have been forwarded in support of grand jury secrecy—to prevent fugitivity by a prospective defendant, to prevent possible tampering with prospective grand jury witnesses, to prevent damage to innocent persons by disclosure of derogatory information about them, to insure freedom of deliberations by the grand jurors and to insure freedom of disclosure by witnesses before the grand jury. *United States* v. *Rose*, 215 F.2d 617, 628 (3rd Cir. 1954); *United States* v. *Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D.Md. 1931); *Pittsburgh Plate Glass Co.* v. *United States, supra* at 405 (dissenting opinion). None of these reasons are valid after a witness has testified at trial and his prior grand jury testimony is sought. Wigmore concludes, VIII Wigmore, *Evidence* (McNaughton rev. 1961), § 2360:

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:

(1) If the grand jury *indicts* D on W's testimony, it is plain that secrecy is no longer of any avail, for W will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of

> the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce. *If on the other hand his testimony now is inconsistent with that before the grand jury, the privilege ought not to apply. The need for the evidence in the criminal prosecution of D exceeds any injury that would inure to the witness-grand jury relation.*" (Emphasis supplied)

The reasons urged against disclosure are identical to those which were urged against the formulation by this Court of the so-called Jencks rule. See *Jencks* v. *United States*, 353 U.S. 657, 666 (1957):

> "The Government opposed petitioner's motions at the trial upon the sole ground that a preliminary foundation was not laid of inconsistency between the contents of the reports and the testimony of Matusow and Ford."

Just as this Court rejected that argument in *Jencks*, so did the Second Circuit, with respect to grand jury testimony, in *Giampa:*

> "This approach is quite unrealistic and would defeat the very purpose of the inspection. How can court or counsel know whether there is inconsistency or not unless the minutes are first read?" 290 F.2d, at 85.

It may be a realistic burden to require the showing of some "particularized need," *Pittsburg Plate Glass, supra* at 400, when outright access to the grand jury testimony is demanded by the defense; but it should be quite another matter when *in camera* inspection is sought.

Petitioners submit that the issue specifically left open in *Pittsburgh Plate Glass* is now ripe and timely for decision by this Court.

2. This was the first case tried before a jury in which a violation of 29 U.S.C. 530 was charged. Defendant's Requested Instructions 20-23 and 27 (Appendix B, App. 22a-23a) all sought to provide some guidance for the jury on the specific nature of the offense here charged. The requests, though founded strictly on the language of the statute, were denied. The statute is clear:

> "It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Perhaps the closest analogy to this statute is found in the Federal Civil Rights Act, 62 Stat. 696 as amended, 18 U.S.C. 242. That statute (and its predecessor), in language remarkably similar to the one at bar, provides:

> "Whoever, under color of any law . . . willfully subjects any inhabitant . . . to the deprivation of any rights . . . secured and protected by the constitution or laws of the United States . . . [shall be punished as the law provides]."

The meaning of the word "willfully" under that statute has undergone a long course of judicial construc-

tion, an analysis of which is helpful in determining the propriety of the requested instructions to this case. The leading case is *Screws* v. *United States,* 325 U.S. 91 (1945), in which this Court concluded, at pg. 101:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the world denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co. 303 U.S. 239. But 'when used in a criminal statute it generally means an act done with a bad purpose.' Id, 290 U.S. p. 394. And see Felton v. United States, 96 U.S. 699; Potter v. United States, 155 U.S. 438; Spurr v. United States, 174 U.S. 728; Hargrove v. United States (CCA 5th) 67 F(2d) 820, 90 ALR 1276. In that event something more is required that the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra; United States v. Murdock, supra. And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 14 U.S. 513, 524:"

The Court then went on to review the legislative history of the statute, and said:

> "Moreover, the history of § 20 affords some support for that narrower construction. As we have seen, the word 'willfully' was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. That was the pattern of criminal legislation which has been sustained without any charge or proof of scienter. Shelvin-

> Carpenter Co. v. Minnesota, 218 U.S. 57; United States v. Balint, 258 U.S. 250, supra. And the present Act in its original form would have been susceptible of the same interpretation apart from the equal protection clause of the Fourteenth Amendment, where 'purposeful discriminatory' action must be shown. Snowden v. Hughes, 321 U.S. 1, 8. But as we have seen, the word 'willfully' was added to make the section 'less severe.' We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness."

Mr. Justice Douglas' language in Screws is equally adaptable to a consideration of Section 610 of the Act. 29 U.S.C. 510. The legislative history provides a very close analogy. The original Kennedy-Ervin Bill, S-505, 86th Cong., 1st Sess., contained no provision such as is presently found as 29 U.S.C. 530. Nor did the Administration Bill S-748, 86th Cong., 1st Sess., I HISTORY, 84-150,[2] introduced by Senator Goldwater. The provision first appeared in Congress as Section 413 (b) of the McClellan Bill, S-1137, 86th Cong.,

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[2] All pertinent parts of the legislative history are compiled in two volumes in Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 prepared by the National Labor Relations Board (Government Printing Office 1959). This compilation is cited hereinafter as I HISTORY, ——. Thus, S. 505 is found at I HISTORY, 29-79.

1st Sess., I HISTORY, 260-324, and, in its initial form, a willful violation of the statute was a felony punishable by *five years* and $10,000. I HISTORY, 319. The Senate Committee on Labor and Public Welfare, to which all three bills were referred, reported S-1555 on April 14, 1959, S. Rpt. No. 187, 86th Cong., 1st Sess., I HISTORY, 397-515, and Section 506 (c) of the bill as reported contained a similar provision to what is now 29 U.S.C. 530, with the exception that a willful violation was a felony punishment by *two years* and $10,000. I HISTORY, 390. S-1555 passed the Senate on April 25, 1959 with that provision. I HISTORY, 516, 575. The Landrum Bill, H.R. 8400, 86th Cong., 1st Sess., I HISTORY, 619-686, was then introduced in the House of Representatives in July of that year and contained a similar provision, but in a statement to the House Committee on Education and Labor, then considering the Landrum Bill, Senator John McClellan, one of the principal architects of this legislation, made it very clear that good faith actions, even expulsion or exclusion from a meeting, do not violate the statute:

> "The criminal enforcement provisions in section 607 [the section number in the bill at that time] also meet with union disapproval. These provisions, of course, are the same as in the original Kennedy-Ervin bill as it was reported out of the Labor Subcommittee. The criticism of this provision typically fails to stress one significant fact; namely, that *no one can be punished unless he has willfully interfered with a member's rights. No officer, who in good faith, makes rulings at a union meeting or who has a drunken and disorderly member excluded from a meeting, can be subjected to any criminal penalty.* Nor, indeed, would I expect any prosecutor even to consider

instituting criminal prosecution in such a case." *Congressional Record,* June 16, 1959, p. 9934 (Emphasis supplied), II HISTORY, 1295.

After the House Committee on Education and Labor reported the bill to the House of Representatives, the felony provision was removed and replaced by a penalty of *one* year and $1,000. Congressional Record, August 13, 1959, p. 14513. II HISTORY, 1685. And Congressman Steward Udall (now Secretary of the Interior), in commenting on this reduction, made the following statement:

> "Sixth. Criminal penalties for forceable interference with rights guaranteed by the act: This was a major dispute between the supporters of the Elliott and Landrum-Griffin bills during floor debate. It was the contention of the backers of the Elliott bill that the Landrum-Griffin penalties were so stringent that they might deter honest men from seeking and holding union office. We argued that the rights conferred by the act were so numerous and varied that in most instances the penalty did not fit the crime with the result that this sanction would be both harsh and unworkable. Our argument on this point prevailed and the Landrum-Griffin bill was quietly amended so that the drastic felony penalty was reduced to a misdemeanor. This solution was then adopted by the conference report."
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> *Congressional Record,* September 4, 1959, p. 16637. II HISTORY, 1722.

Thus, it is clear that the intent of Congress has been, from the outset, not only to keep the penalty within reasonable bounds and to impose a penalty only under those circumstances where one is absolutely required, but to eliminate from criminal consideration good

faith action by union officers and members. The analogy to the Federal Civil Rights Act is clear.

Under *Screws, supra,* at 107, the defendants are entitled to have the jury, in determining "whether [the] requisite bad purpose was present," "consider all the attendant circumstances—the malice of the petitioners, the weapons used in the assault, its character and duration, *the provocation, if any,* and the like." (Emphasis supplied). Similar standards should apply to this statute and the trial judge erred in failing to grant petitioners' requested instructions (A. App. 644a-645a). The evidence was at least susceptible of a conclusion that the exclusion was to be accomplished peacefully. Except for the Flounders incident, it was. Both prior to and after that incident such peaceful exclusions did occur. Under such circumstances, failure to allow the jury to determine "the provocation, if any" which led to the melee was error.

It is submitted that had petitioners Bertucci and McCabe struck Flounders in self-defense, and *not with the specific intent to enjoin him from attending the meeting,* there would be no violation of the statute. Yet, the Court refused to submit an instruction to that effect to the jury. Analysis of other cases under 18 U.S.C. 242 supports the suggestion of the additional charges on the origin of the affray as bearing on the element of willfulness. A close analogy appears in *Clark* v. *United States,* 193 F.2d 294 (5th Cir. 1951). In that case the appellant was indicted, under 18 U.S.C. 242, for inflicting a beating upon one Carlisle, a prison inmate, as a result of which Carlisle died. Clark contended that he had beaten Carlisle in an effort to overcome his resistance to being placed in a cell. Although the jury did not agree, the significant

fact is that the trial court gave, and the Court of Appeals affirmed, an instruction on the question of *excessive* force. 193 F.2d, at 295. The Court of Appeals concluded that the charge stated the law "with substantial accuracy." 193 F.2d, at 297. In *McDonald* v. *United States,* 9 F.2d 506 (8th Cir. 1925), the accused was indicted for conspiring to oppress one A. J. Akard in the exercise of his (Akard's) right to hold the office of Postmaster. The indictment charged:

> "'* * * in pursuance of said unlawful and felonius agreement, combination and conspiracy, and in the prosecution thereof' defendants bound and, with a revolver and whips, attacked Akard and directed him 'to leave the county before sunset of the following day.'"

The accused requested a charge which stated his theory of why the beating occurred:

> "You are instructed that before you can convict the defendants you must believe from the evidence beyond a reasonable doubt that they conspired together to prevent the prosecuting witness, Akard, from discharging the duties of the office of postmaster and that pursuant to the conspiracy and in furtherance thereof they beat and threatened Akard for the purpose and with the specific intent to prevent him from discharging his duties of the office of postmaster; and you are instructed that *although they conspired together to beat and threaten the prosecuting witness, Akard, yet if the conspiracy and beating was because of the reports they had heard about his conduct toward the girl,* or for any other reason except the specific intent to prevent him from discharging and performing the duties of postmaster, *the defendants must be acquitted,* and the fact that *if Akard had been driven out of the state he could not perform*

> *the duties of postmaster, would not make the defendants guilty unless they conspired with the specific intent to prevent him from discharging the duties of postmaster.*" (Emphasis supplied)

The trial court refused such a charge and the Eighth Circuit, reversing, 9 F.2d at 508, commented "... something in the nature of this request should be given if asked," at the new trial.

There is no reasonable doubt in this case that various members were excluded from a union meeting. There is also no room for doubt that some violence *accompanied* that exclusion. The Court of Appeals said:

> "The evidence as a whole, to say the least, was quite sufficient for that body [the jury] to decide as it did that the expressed purpose of Bertucci and the others involved in the Flounders incident was to attempt to bar him from the meeting and the exercise of his membership rights, which attempt was entirely successful." (App. 12a)

But the question is not whether violence *accompanied* the exclusion but whether it was inflicted *with intent* to exclude. While the petitioners would quarrel with the court's conclusion in any event, their basic complaint is that the jury, as instructed, could have convicted them simply because Flounders was in a fight. The question of provocation, among others, was never submitted.

In as sensitive an area as intra-union politics and policies, the federal government should intrude only to protect some federally guaranteed right. The guarantee of these rights and the protection afforded as

a result of them is at the heart of the 1959 labor reform legislation. To stretch these guaranties to cover a case in which a federal crime is created (by the refusal to give properly limited instructions) from a normal police court assault and battery situation, is to go far beyond either the intent or power of Congress. This Court recognized this limitation in *Screws;* the analogy is equally applicable here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

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